Supreme Court, U.S.
FILED

No. _____

10-362 SEP 14 2010

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In The

Supreme Court of the United States

GERALD O. BAILEY, for himself and
on behalf of, UNITED STATES OF AMERICA,
STATE OF COLORADO, and
MONTEZUMA COUNTY, COLORADO,

Petitioners,

v.

SHELL WESTERN E&P INC.,
KINDER MORGAN CO2 COMPANY, LP,
SHELL OIL COMPANY, and
RICHARD TIMOTHY BRADLEY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Texas courts have jurisdiction or venue to decide issues involving Colorado lands, royalty interests and taxing authority belonging to the United States, Colorado, Montezuma County and Mr. Bailey or whether such jurisdiction and venue are in Colorado and lower courts may not ignore 31 U.S.C. § 3730(b)(5) to transfer jurisdiction from where it was first filed in Colorado to Texas.

II. Whether the Local Action Rule of 28 U.S.C. § 1392 and 31 U.S.C. § 3732(b) remain viable or may be ignored when the claims of Colorado and Montezuma County involving Colorado lands, taxing authority, and royalty interests relate to the same transactions and occurrences as in the first filed *qui tam* action.

III. Whether a relator is an original source when his action is based on his personal claims which support the *qui tam* action filed on behalf of the United States, Colorado and Montezuma County, Colorado.

LIST OF PARTIES

PETITIONERS:

Gerald O. Bailey

United States of America

State of Colorado

Montezuma County, Colorado

RESPONDENTS:

Shell Western E&P Inc.

Kinder Morgan CO2 Company, LP

Shell Oil Company

Richard T. Bradley

STATEMENT PURSUANT TO RULE 29.6

None of the Petitioners is in corporate form.

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The Opinion of the United States Court of Appeals for the Fifth Circuit dated June 16, 2010 is set forth in the Appendix, 1a. The Opinion on Summary Judgment of the U.S. District Court for the Southern District of Texas dated April 22, 2008 is set forth in the Appendix, 38a. The Order of the U.S. District Court for the Southern District of Texas dated January 19, 2006 is set forth in the Appendix, 60a. The internal Shell memorandum issued April 27, 1981 using transportation charges to reduce royalty and taxes is set forth in the Appendix, 61a.

JURISDICTION OF THE SUPREME COURT

The Opinion of the Court of Appeals was entered on June 16, 2010. The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Statutory Issues

28 U.S.C. § 1392

> Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.

31 U.S.C. § 3730(b)(5)

When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based upon the facts underlying the pending action.

31 U.S.C. § 3730(e)(4)

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3732(b)

Claims under State Law – The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the

same transaction or occurrence as an action brought under section 3730.

STATEMENT OF THE CASE

On April 9, 2004, Mr. Bailey filed a False Claims Act action involving the McElmo Dome carbon dioxide unit located in Montezuma County, Colorado in the Colorado United States District Court against Kinder Morgan CO2 Company, LP ("Kinder Morgan") and Richard Timothy Bradley. The Colorado action is the only false claims action Mr. Bailey ever filed as Plaintiff. The case was filed in Colorado because the McElmo Dome Unit was formed under the unique law of Colorado that allows for the unitization or pooling of a field-wide reservoir of minerals located in Colorado. Colo. Rev. Stat. § 34-60-118. The proposal for the unit called for the pooling of over 203,000 acres of Colorado lands belonging to the United States, the State of Colorado and other private and government interests. Mr. Bailey owned, and continues to own, overriding royalty interests in over 5000 acres of the land and was one of the original parties involved in the formation of the unit in 1983.

The case involved his personal claims as an overriding royalty owner and asserted fraud in the formation of the unit and asserted *qui tam* claims on behalf of the United States, the State of Colorado and Montezuma County, Colorado. The United States and

Colorado own the vast majority of the land contained in the unit. Mr. Bailey, the United States, Colorado and Montezuma County all own royalty interests in the unit.

The unit is located entirely within Montezuma and Dolores Counties, Colorado. Before the unit was formed development of the carbon dioxide was based upon seven separate federal participation units. Due to the multiplication of development costs the oil companies that controlled 85% of the working interests of the field, Mobil and Shell, proposed to combine the entire field into one unit. Federal law did not authorize such a combination. Only Colorado law allowed for the formation of a field-wide unit and this action is unique to Colorado. Using the Colorado statute the Colorado Oil and Gas Conservation Commission approved the formation of the unit in 1983 and the unit has continued to exist under different operators to this day. The *qui tam* action filed by Mr. Bailey covered violations committed by the current Unit Operator, Kinder Morgan, for the period beginning in March of 2000 when Kinder Morgan purchased Shell's interests and became Unit Operator. Shell was not a party.

Six years before Mr. Bailey filed the Colorado *qui tam* action, Shell Western E&P Inc., an owner and then Operator of the Unit, sued Mr. Bailey in a declaratory judgment action in a Houston, Texas state court requesting a declaration that Shell Western E&P Inc. was entitled under the assignments that created Mr. Bailey's overriding royalty interests and

Colorado law to calculate Mr. Bailey's royalties in the manner it had done so since 1984. Mr. Bailey's motion to transfer the suit to Colorado where the land was located was denied. Kinder Morgan did not exist in 1998 and was not a party to the suit.

On June 15, 2004, two months after the Colorado false claims action was filed, Mr. Bailey as a defendant filed counterclaims in the Houston state court case alleging federal and Colorado false claims involving McElmo Dome for the period 1984 to March 2000 when Shell sold its interests. The counterclaims were against Shell Western E&P Inc., Shell CO2 Company, Ltd. and Shell Oil Company. The claims were compulsory counterclaims in the case brought by Shell against Mr. Bailey. The counterclaims were filed under seal and remained under seal until November 29, 2004 when the state court ordered service on Shell after the United States declined intervention. Shell was served on December 6, 2004 but filed no responsive pleading in the state court proceeding and the case remained in the state court until Shell sought to include Kinder Morgan in the state case. When Shell sought to include Kinder Morgan, Mr. Bailey removed the state court case to federal court on March 11, 2005 and requested the case be transferred to the Denver federal court. The removal was to protect the jurisdiction and secrecy Order of the Colorado Court.

On April 7, 2005, the Texas federal judge ordered Mr. Bailey to file a motion with the Colorado federal court to transfer the Colorado case against Kinder

Morgan to his court. On November 18, 2005, the Colorado federal court electronically transferred the Colorado case to Texas. Mandamus was requested on December 1, 2005 and an injunction initially issued but the Tenth Circuit held it lost jurisdiction of the case once the transfer was docketed in Texas and dismissed the injunction and mandamus.

On January 19, 2006, the Texas district court ordered Mr. Bailey to file an amended complaint as Plaintiff. Appendix, 60a. By Summary Judgment Opinion dated April 28, 2008 the Texas federal court ruled against Mr. Bailey and the *qui tam* Plaintiffs on all counts. Appendix, 38a. The Fifth Circuit Court of Appeals affirmed on June 16, 2009. Appendix, 1a.

REASONS FOR GRANTING THE WRIT

I. Texas courts lack jurisdiction and venue to adjudicate land and royalty interests in Colorado that belong to the United States, Colorado, Montezuma County and Mr. Bailey and Texas courts lack jurisdiction and venue to decide the power of Colorado and Montezuma County to tax Colorado lands and property interests. Certiorari is needed to protect the jurisdiction and venue for a *qui tam* action involving real property and royalty interests of Colorado and Montezuma County, Colorado and protect 31 U.S.C. § 3730(b)(5) to prevent transfer of the action where it was first filed from Colorado to Texas.

The false claims action filed by Mr. Bailey involves the fraud of oil companies in the formation of a Colorado carbon dioxide unit and royalties associated with the production of carbon dioxide from that unit belonging to the United States, Colorado, and Montezuma County. The governments hold the land as stewards for citizens of the United States as well as citizens of Colorado and Montezuma County. Mr. Bailey has also been defrauded in the payment of his royalty from the production of carbon dioxide allocated to his overriding royalty interests. While the royalty payable to the United States is significant, its royalty is shared with Colorado. The payments due to Colorado and Montezuma County are involved with their separately owned real property interests in the Colorado lands. Of equal significance is the damages

suffered by Colorado and Montezuma County as a result of the deliberate scheme of the oil companies to structure the unit and the pipeline from the unit to reduce the payment of royalty by over 18% and Colorado severance taxes of over 7% before the unit was formed. Appendix, 61a.

The false claims action asserted claims and remedies on behalf of the United States and all of the acts proscribed occurred in Colorado where the defendant could be found and transacted business. Jurisdiction for the action was in Colorado under 31 U.S.C. § 3732. The false claims action asserted claims on behalf of Colorado for Colorado trust lands located in Colorado and Colorado severance taxes avoided. The lands are managed by, and the leases issued by, the Colorado Land Board and jurisdiction for the action was in Colorado under 31 U.S.C. § 3732(b). Colorado law requires proceeds from the leases to be used only for support of common schools in Colorado. *Colorado v. City of Littleton,* 515 P.2d 1121 (Colo. 1973). Colorado's Constitution forbids altering or reducing the amounts for education generated from the management of school trust lands. *Colorado v. East Lake Creek Ranch, LLP,* 31 P.3d 886 (Colo. 2001) and *Branson School District v. Romer,* 161 F.3d 619 (10th Cir. 1998). The false claims action also asserted claims on behalf of Montezuma County, Colorado for its royalty interests in the McElmo Dome Unit and the county ad valorem and other taxes avoided and jurisdiction for the action was in Colorado under 31 U.S.C.

§ 3732(b). Jurisdiction did not exist in Texas as Texas courts were strangers to these matters.

Under the statutory first to file rule contained in 31 U.S.C. § 3730(b)(5) only the Government could intervene or bring a related action based upon the facts underlying the pending action which related to the period beginning when Kinder Morgan became Unit Operator of the McElmo Dome carbon dioxide unit. Kinder Morgan was barred from pursuing or bringing any claims in the Houston state court based upon facts which were involved in the Colorado federal court case by the statutory provisions of the False Claims Act. Any claim brought by another based upon the facts underlying the Colorado false claims action was barred and had to be dismissed or transferred to Colorado. *United States, ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214 (D.C. App. 2003). The Colorado court violated the statutory and jurisdictional requirements of false claims actions by the transfer to Texas and the error was compounded by the courts below. Certiorari is needed to protect jurisdiction and venue for *qui tam* actions and protect the royalty and taxing interests of the United States, Colorado and Montezuma County in Colorado lands and property interests.

II. Certiorari is needed to preserve the local action rule of 28 U.S.C. § 1392 and the jurisdictional statute of 31 U.S.C. § 3732(b) when claims involving land and royalty interests of Colorado and Montezuma County, Colorado are at issue.

The false claims action is based upon the unlawful and fraudulent taking of the carbon dioxide and mineral interests belonging to Mr. Bailey, the United States, Colorado and Montezuma County based upon their ownership of real and personal property in Colorado. Under the law of the United States it is a local action which can only be brought within the State in which the land lies. *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895). This action is local and the place involved is in Colorado and any decision by a court outside the boundary of Colorado is jurisdictional and Texas courts are without jurisdiction to decide the case. 28 U.S.C. § 1392. *Minichiello Realty Associates, Inc. v. Britt*, 460 F.Supp. 896 (D. N.J. 1978), *affirmed,* 605 F.2d 1196 (3rd Cir. 1979) and *Hayes v. Gulf Oil Corporation,* 821 F.2d 285 (5th Cir. 1987). The specific cause of action in this case could only have arisen in Colorado where the specific property rights and claims involving the Colorado McElmo Dome carbon dioxide unit are located. The unit is a creation of Colorado statute governed by Colorado law and involves real property interests in Colorado owned by the United States, Colorado and Montezuma County. The Colorado federal court has sole jurisdiction of any actions based upon facts underlying the false claims action by reason of 31

U.S.C. § 3732. The *qui tam* action involves real property interests owned by the United States as a steward for citizens of the United States and Colorado citizens as a result of the sharing mechanism it has with Colorado. Montezuma County and Colorado also have interests at stake deriving from their ownership of property interests in the Colorado unit. Furthermore, Colorado and Montezuma County have an added interest in the action as they have taxing authority over the land and the production of minerals from the land which are involved in the case.

Certiorari is needed to preserve the local action rule of 28 U.S.C. § 1392 and the jurisdictional statute of 31 U.S.C. § 3732(b) when claims involving land and royalty interests of Colorado and Montezuma County, Colorado are at issue.

III. Certiorari is needed to protect the interests of the United States, Colorado and Montezuma County when the relator's status as an original source is based upon the personal claims of the relator which support the claims of the United States, Colorado and Montezuma County, Colorado under 31 U.S.C. § 3730.

Mr. Bailey has been intimately involved in his overriding royalty interests in the Yellow Jacket Unit and the McElmo Dome Unit for forty years. He has held overriding royalty interests in the properties since the early 1970s and retains his overriding royalty interests today. Mr. Bailey receives monthly

detail statements for his overriding royalties in McElmo Dome production and from the information he discovered the fraud and price manipulations practiced against the United States, Colorado and Montezuma County. Mr. Bailey is an original source under 31 U.S.C. § 3730(e)(4)(A). An "original source" is an individual who has direct and independent knowledge of the information on which the allegations are based and voluntarily provided the information to the Government. 31 U.S.C. § 3730(e)(4)(B).

Mr. Bailey has pursued his own claims independently of others for fourteen years. The information and facts he has discovered have not changed. His own work led him to discover that the Unit Operator of the McElmo Dome carbon dioxide unit was defrauding royalty owners, not just overriding royalty owners like him. In this regard he is more of an original source than the relator in *Kennard v. Comstock Resources, Inc.,* 363 F.3d 1039, 1044-46 (10th Cir. 2004). Mr. Bailey secured the evidence of the fraudulent conspiracy of the oil companies to fix prices for McElmo Dome carbon dioxide before the unit was formed. Mr. Bailey's inquiries led to his discovery that Shell was trading carbon dioxide for oil field working interests and Shell fabricated a value for royalty interests thereby manipulating royalty values in violation of Colorado's antitrust and unfair practices law. Mr. Bailey shared this information with the United States and Colorado that they were being swindled out of the oil field interests in violation of federal statutes and the law of Colorado dealing with

antitrust, unfair practices and civil theft. Mr. Bailey discovered the use of zero priced and negative priced sales contracts for royalty calculations in violation of Colorado's antitrust, unfair practices and civil theft statutes. Mr. Bailey discovered the unlawful conspiracy and combination of the Cortez Pipeline partners to set unlawful prices for the Cortez Pipeline Company transportation charges and illegally manipulated the royalty prices for McElmo Dome royalty owners, and Mr. Bailey discovered the enormous profits enjoyed by the Cortez Pipeline Company due to the fraud on royalty owners. Mr. Bailey discovered the secret price fixing document entitled Royalty Claim Indemnification Agreement dated April 5, 2000 when Shell's interests in McElmo Dome were sold to Kinder Morgan. Mr. Bailey shared this information with the United States and Colorado before filing the False Claims Act action in Colorado on April 9, 2004. Mr. Bailey secured the admission that carbon dioxide produced from McElmo Dome had no value where produced and had to be transported to the West Texas marketplace before it had value. Mr. Bailey had direct and independent knowledge of the information upon which his claims were based.

Certiorari is needed to protect the interests of the United States, Colorado and Montezuma County when the relator's status as an original source is based upon the personal claims of the relator which support the claims of the United States, Colorado and Montezuma County, Colorado under 31 U.S.C. § 3730.

The Court should grant the writ.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20313

GERALD O. BAILEY, for himself and on behalf of United States of America, State of Colorado, and Montezuma County, Board of Commissioners; MONTEZUMA COUNTY COLORADO; UNITED STATES OF AMERICA; STATE OF COLORADO

Plaintiffs-Appellants

v.

SHELL WESTERN E&P, INC, now known as SWEPI LP, doing business as Shell Western E&P, KINDER MORGAN CO2 COMPANY, LP, formerly known as Shell CO2 Company Ltd; SHELL OIL COMPANY

Defendants-Appellees

UNITED STATES OF AMERICA; STATE OF COLORADO; GERALD O. BAILEY; HARRY PTASYNSKI

Plaintiff-Appellants

v.

KINDER MORGAN CO2 COMPANY, LP, A Texas Limited Partnership; RICHARD TIMOTHY BRADLEY

Defendants-Appellees

HARRY PTASYNSKI

Plaintiff-Appellant

v.

KINDER MORGAN GP, INC

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jun. 16, 2010)

Before JONES, Chief Judge, and GARZA and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In 1998, Shell Western E&P Inc. ("Shell") sued Gerald Bailey in Texas state court for a declaration regarding the proper calculation method for royalties on carbon dioxide ("CO_2") in the McElmo Dome. Bailey counterclaimed. In 2005, the case was removed to federal court in the Southern District of Texas. The District of Colorado then transferred a similar action, *Ptasynski v. Kinder Morgan G.P., Inc.*, to the Southern District of Texas, where it was consolidated with the Shell case. The district court granted summary judgment in favor of Shell, and Bailey and Ptasynski appealed. We AFFIRM.

I. FACTUAL BACKGROUND[1]

In the 1970s, due to the rising costs of oil, petroleum companies began to investigate the use of CO_2 to increase oil output from older fields. They discovered that when CO_2 is injected under sufficient pressure into an older field, it mixes with oil underground, dislodging it from the surrounding rock and enhancing its recovery. This process is known as tertiary or enhanced oil recovery ("EOR"). Oil fields in West Texas were considered prime candidates for EOR.

The largest CO_2 field capable of supplying these West Texas fields was the McElmo Dome area, located in Montezuma and Dolores counties, Colorado. Together, Shell and Mobil Producing Texas & New Mexico Inc. ("MPTN") owned 87% of the total working interest in the McElmo Dome area. Shell and MPTN believed that the abundant CO_2 reserves of the McElmo Dome area could be harvested more efficiently if the area was operated as a single unit. A partnership was formed to construct, own, and operate a 500-mile pipeline that would carry CO_2 from McElmo Dome to fields in West Texas.

Shell filed an application with the Colorado Oil & Gas Commission ("Commission") to operate the

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[1] The factual background of this case, set forth by this Court in 2002, remains the same. *See Ptasynski v. Shell Western E&P, Inc.*, No. 99-11049, 2002 WL 32881277, at *1 (5th Cir. 2002) ("*Ptasynski I*").

McElmo Dome area as a single unit. The Commission preliminarily approved Shell's application, but required Shell to obtain the consent of 80% of the non-cost bearing royalty interest owners. In order to obtain such consent, Shell sent a package of materials to the royalty interest owners. The package included: 1) a brochure entitled "A Program for Unit Operations," which was designed to provide an overview of the project; 2) the Unit Agreement for the proposed McElmo Dome Unit; and 3) a ratification form by which the royalty interest owners could manifest their assent to the Unit Agreement. The brochure contained information in the form of questions and answers. Among these was the following:

> "Will the royalty owners of interest in this unit have to pay for the pipeline, transportation or injection of CO_2 in West Texas? No."

Bailey and Ptasynski are both independent geologists with decades of experience in the oil and gas industry. Each holds overriding royalty interest in the McElmo Dome Unit, and each received Shell's package and signed and returned the ratification form. Ultimately, Shell obtained the consent of 92.5% of the total royalty interest. As a result, the McElmo Dome Unit became effective and production of CO_2 began in December 1983.

Bailey and Ptasynski have been receiving royalties from the McElmo Dome Unit production since 1984. Such royalties were based on the CO_2's value at the "tailgate" of the McElmo Dome plant, before being

transported via pipeline to West Texas. Shell determined this value by subtracting the cost of transportation from the delivered sales price.

II. PROCEDURAL HISTORY

The parties have a long and tortured history of litigation over payment of royalties flowing from the McElmo Dome.

A. Previous Cases

1. *Class Actions*

In 1996, the CO_2 Coalition – seventy owners of varying interests in McElmo Dome – brought a putative class action against Shell, Kinder Morgan, Mobil, and Cortez Pipeline in Colorado federal district court. In 2000, three other class actions were filed in that court by classes of (a) land owners, (b) royalty owners, and (c) non-operating working interest owners. In September 2001, the four cases were settled. Ninety-six percent of the royalty interest owners joined in the settlement.

Both Bailey and Ptasynski declined to join in the settlement, instead filing cases in the Northern District of Texas in 1997.

2. *Bailey I*

Bailey sued Shell in 1997, asserting state law claims and one federal claim: that the 1099 tax forms

Shell sent them were fraudulent and violated 26 U.S.C. § 7434. *Bailey v. Shell Western E&P, Inc.*, No. 3-97-0518-R, 1998 WL 185520, at *1 (N.D. Tex. Apr. 14, 1998). The district court held the tax claim was not viable and dismissed it with prejudice. *Id.* at *3. The district court declined to exercise supplemental jurisdiction over the state law claims. *Id.* This Court affirmed. *Bailey v. Shell Western E&P, Inc.*, 170 F.3d 184 (5th Cir. 1999).

3. *Ptasynski I*

Ptasynski sued Shell and Mobil on the same theories as Bailey, also in 1997. The district court dismissed the tax fraud and fraudulent concealment claims on summary judgment. *Ptasynski v. Shell Western E&P, Inc.*, No. 3:97-CV-1208-R, 1999 WL 423022, at *8 (N.D. Tex. June 16, 1999). After a bench trial, the court ruled for the defendants on all but the negligent misrepresentation and declaratory judgment claims. This Court rendered judgment entirely for the defendants. *Ptasynski I*, 2002 WL 32881277, at *14.

B. This Case

1. *The Original Declaratory Action*

This lawsuit began in 1998 as a declaratory judgment action in state court in Harris County, Texas. Shell sued Bailey for a declaration that it had been paying royalties properly. Bailey asserted state law counterclaims, including breach of contract,

fraud, and breach of fiduciary duty. By March 2001, the state court had resolved all issues by summary judgment in favor of Shell except the fraud-based counterclaims.

Meanwhile, other cases about McElmo Dome CO_2 royalties were pending against Shell in the statutory probate court of Denton County, Texas. In March 2001, the probate judge took this case under section 5B of the Texas Probate Code. In August 2002, the Texas Supreme Court held the transfer was void and returned the case to Harris County. *In re SWEPI, L.P.*, 85 S.W.3d 800 (Tex. 2002). The case was then abated until March 2004.

In June 2004, Bailey filed his Eighth Amended Counterclaims in this case, alleging False Claims Act ("FCA") claims substantively identical to those he asserted in a lawsuit filed in Colorado in April 2004 (the "First Colorado Lawsuit"). The Eighth Amended Counterclaims were filed under seal. The state court unsealed the Eighth Amended Counterclaims in November 2004, after the government declined to intervene.

On March 24, 2005, Bailey removed the declaratory judgment action from state court to the Federal District Court for the Southern District of Texas.

2. *The First Colorado Lawsuit*

In April 2004, Bailey and Ptasynski filed the First Colorado Lawsuit in the Federal District Court

for the District of Colorado, a sealed action about the same royalty issues at issue in Texas state court. They asserted individual claims and *qui tam* FCA claims for the United States and allegedly for Colorado and Montezuma County, Colorado. The case remained sealed until April 2005.

In May 2005, the Colorado district court ordered the First Colorado Lawsuit transferred to the Southern District of Texas. *United States v. Kinder Morgan Co.*, No. 04-CV-00716-WDM, 2005 WL 3157998, at *3 (D. Colo. Nov. 21, 2005). After the Colorado court's transfer of the First Colorado Lawsuit to Texas, Bailey and Ptasynski, in December 2005, petitioned for mandamus in the Tenth Circuit. *Ptasynski v. Kinder Morgan G.P., Inc.*, 220 F. Appx. 876 (10th Cir. 2007). Mandamus and certiorari were denied.

3. *Proceedings in the Southern District of Texas*

Upon removing the declaratory judgment action from state court to the Southern District of Texas in March 2005, Bailey filed under seal an *ex parte* motion to transfer venue to Colorado. The district court did not transfer the case, instead ordering Bailey to move to transfer the year-old First Colorado Lawsuit to Texas.

Bailey then petitioned the Fifth Circuit for mandamus based on the district court's refusal to transfer this case to Colorado. This Court summarily denied mandamus; the Supreme Court denied certiorari. In

July 2005, Bailey and Ptasynski also unsuccessfully sought an anti-suit injunction in the First Colorado Lawsuit, trying to shut down this Texas case.

Once the First Colorado Lawsuit's transfer was final, Ptasynski tried to voluntarily dismiss his claims without prejudice. The district court declined to dismiss the case. When it was clear that litigation was continuing, Ptasynski refused service copies of documents sent by mail. The district court then granted summary judgment on all issues in favor of Shell on April 22, 2008.

C. Additional Litigation

Ptasynski filed yet another lawsuit in Colorado in April 2006. The case was promptly transferred to Texas. Ptasynski both voluntarily dismissed his claims and appealed the transfer. The appeal was dismissed as moot. *Ptasynski v. Kinder Morgan G.P., Inc.*, 220 F. Appx. 876 (10th Cir. 2007).

III. DISCUSSION

Bailey and Ptasynski appeal the district court's grant of summary judgment in favor of Shell. They raise claims based on jurisdiction, choice-of-law determinations, Texas law, and discovery rules. Ptasynski raises two claims on appeal: (1) his voluntary dismissal under Federal Rule of Civil Procedure 41(a) immediately divested the district court of jurisdiction, and (2) the district court improperly applied

the substantive law of Texas rather than Colorado law. Bailey appeals on two jurisdictional and three non-jurisdictional grounds: (1) the district court lacked jurisdiction pursuant to the local action doctrine and the FCA's first-to-file rule; (2) the district court erred in concluding that Bailey is not an "original source" under the FCA's jurisdictional requirements; (3) the district court improperly applied the substantive law of Texas rather than Colorado law; (4) the district court erred by granting summary judgment on Bailey's claims under Texas law; and (5) the district court incorrectly failed to exclude evidence that allegedly was not produced by Shell as required under Federal Rule of Civil Procedure 26.

A. Refusal to Dismiss under Rule 41(a)(1)(A)

Ptasynski argues that the district court erred in entering summary judgment because he filed a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a).[2] He maintains that the filing of the Rule 41(a) dismissal immediately divested the district court of jurisdiction. This question of law is reviewed *de novo*. *Abraham v. State Farm Mut. Auto. Ins. Co.*, 465 F.3d 609, 611 (5th Cir. 2006).

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[2] Ptasynski's Notice of Voluntary Dismissal referred only to Rule 41(a). The Court notes that Ptasynski's voluntary dismissal is governed by Rule 41(a)(1)(A)(i).

Rule 41(a)(1)(A)(i) provides that without a court order,

> a plaintiff may dismiss an action without a court order by filing: a notice of dismissal before the opposing party serves an answer or motion for summary judgment . . .

FED. R. CIV. P. 41(a)(1)(A)(i).

After Ptasynski filed the notice of voluntary dismissal, Shell filed a response in opposition to the dismissal and Ptasynski did not file a reply. The district court then conducted a conference on January 18, 2006. Although the district court did not issue an order specifically denying dismissal, the record from the conference reflects the district court's reasoning and ruling:

> The court: . . . [T]hey haven't withdrawn until I have blessed their withdrawal. This is a very unusual suit. This is not one party and another party and one party abandoning it. This is one party vigorously litigating it in three or four forums and then we transferred somebody else trying to cut and run, only to refile again.
>
> . . .
>
> Counsel for Ptasynski: . . . [T]hey told me they wanted to be dismissed totally from the case and directed me to file the notice of dismissal, which I did.
>
> The court: All right. Well, you need to do one more thing. Tell them that they are not

> dismissed. The only way they may be dismissed is if they dismiss their claims against everybody and everything in connection with the McElmo Dome with prejudice, or they commit that if they ever file anything again, they file it here. But they can't do that and I'm not confident they are doing it.
>
> Counsel for Ptasynski: Your Honor, they are doing it.
>
> The court: . . . [T]hey will be in here until I get a commitment from them about what their plans are for this – and by this litigation, I don't mean any particular civil action number. I mean the guerilla warfare that's gone on for a decade about the McElmo Dome. So I'll be happy to dismiss them with prejudice, but I'm not going to let them sneak off from this case after everything that's gone on, only to file it in Panola County, Mississippi next week. And so you need to convey that to them that they are active members of this case until I dismiss them.

Generally, Rule 41(a)(1) dismissal results in immediate termination of the suit. *Harvey Specialty & Supply, Inc. v. Anson Flowline,* 434 F.3d 320, 324 (5th Cir. 2005) ("The plaintiff has an 'absolute right' to a Rule 41(a)(1) dismissal, and '[t]he effect of [a Rule 41(a)(1)] dismissal is to put the plaintiff in a legal position as if he had never brought the first suit.'") (internal citations omitted). Dismissal under Rule 41(a)(1) is "a matter of right running to the plaintiff and may not be extinguished or circumscribed by

adversary or court." *Am. Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963).

The district court erred in its treatment of Ptasynski's attempted Rule 41(a)(1) dismissal by imposing the condition that the dismissal be with prejudice. In light of Ptasynski's claims pursuant to the FCA, however, that error is harmless.

The FCA provides that:

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(b). Thus, Ptasynski could not dismiss his *qui tam* action without written consent of the court and the Attorney General, which he did not obtain.

Ptasynski asks the Court to carve out an exception from the § 3730(b) consent requirement for plaintiffs who wish to withdraw from multi-plaintiff *qui tam* actions. The consent requirement for dismissal of a *qui tam* action safeguards the government's interests; it "encourag[es] the government to monitor relators' actions and step in when a relator is not acting in the best interest of the public." *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 159 (5th Cir. 1997). "For more than 130 years, Congress has

instructed courts to let the government stand on the sidelines and veto a voluntary [dismissal]. It would take a serious conflict within the structure of the FCA or a profound gap in the reasonableness of the provision for us to be able to justify ignoring this language." *Id.* at 160. Like the *Searcy* court, here "we can find neither." *Id.*

As Ptasynski argues, the dismissal of one plaintiff from a multi-plaintiff case will not result in dismissal of the entire action. But dismissal of one plaintiff may nonetheless impair the government's interests even where another plaintiff remains in the suit to litigate on behalf of the government. Additionally, seeking the written consent of the government and the court in no way constitutes a significant burden for a plaintiff – if the government's interests are not impacted, then consent will surely be freely granted. The language of § 3730(b) "is as unambiguous as one can expect" and we will not erode the statutory protection of the government's interest simply for the sake of convenience. *Id.* at 159.

Nor could Ptasynski have dismissed just his individual claims, as he now suggests. Rule 41(a) dismissal only applies to the dismissal of an entire action – not particular claims. *Exxon Corp. v. Md. Cas. Co.*, 599 F.2d 659, 662 (5th Cir. 1979) ("[W]hen Rule 41(a) refers to Dismissal of an 'action', there is no reason to suppose that the term is intended to include the separate claims which make up an action. When Dismissal of a claim is intended, as in Rule 41(b), that concept is spelled out in plain language.").

B. Denial of Transfer to Colorado

Bailey claims that the Southern District of Texas lacked subject matter jurisdiction over this case and erred by denying transfer to the District of Colorado. When addressing a determination of subject matter jurisdiction, we review application of law *de novo* and disputed factual findings for clear error. *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009).

1. *Jurisdiction under the FCA*

Bailey asserts that the District of Colorado had sole jurisdiction over the FCA action pursuant to the first-to-file bar of § 3730(b)(5), and the Southern District of Texas therefore lacked subject matter jurisdiction.

The FCA provides:

> Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred.
>
> . . .
>
> When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

31 U.S.C. §§ 3732(a), 3730(b)(5).

Shell filed this lawsuit in Texas state court in 1998, Bailey and Ptasynski filed the Colorado lawsuit alleging *qui tam* claims in April 2004, and Bailey added *qui tam* counterclaims in this case in November 2004. Although the *qui tam* action was filed in Colorado prior to being added to the Texas case, the district courts did not err in determining that the Southern District of Texas was a proper forum for the FCA action. We agree with the reasoning of the District of Colorado court when ordering the transfer to the Southern District of Texas: the first-to-file bar "does not apply when the same plaintiff, for whatever reason, files the same claim in a different jurisdiction as the Plaintiffs did here." *Kinder Morgan Co.*, 2005 WL 3157998, at *2. As we recently noted in *Branch Consultants*, if an FCA claim "ha[s] already been filed by *another*, the district court lack[s] subject matter jurisdiction. . . ." 560 F.3d at 376 (emphasis added).

The two competing policy goals of § 3730(b) are to encourage whistleblowing and to discourage opportunistic behavior. *Id.* Neither of the statutory purposes are served when the same plaintiff makes the same claim in a different jurisdiction.[3] *Kinder Morgan*

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[3] In fact, Plaintiffs' attempts at forum shopping constitute the opportunistic and parasitic behavior that the FCA seeks to preclude. *See Branch Consultants*, 560 F.3d at 376 ("the provisions seek to discourage opportunistic plaintiffs from filing parasitic lawsuits"). In the District of Colorado, the plaintiffs relied on the prohibition of § 3730(b)(5) to resist the motion to transfer from Colorado to Texas. Yet they also knowingly violated the same prohibition when filing their *qui tam* counterclaim in the

(Continued on following page)

Co., 2005 WL 3157998, at *2. We therefore construe the first-to-file bar of § 3730(b)(5) as inapplicable to one plaintiff who files the same claim in multiple jurisdictions.

2. *28 U.S.C. §§ 1392, 1631, and the Local Action Doctrine*

Bailey asserts that the Southern District of Texas lacked subject matter jurisdiction pursuant to the local action doctrine,[4] and § 1631 therefore required transfer of the case back to Colorado.

Section 1631 provides that:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . .

28 U.S.C. § 1631.

The local action doctrine requires that "a local action involving real property can only be brought

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Texas case, for the apparent purpose of obtaining federal jurisdiction.

[4] This Court has noted that questions remain as to whether the local action doctrine runs to the jurisdiction or the venue of a court. *Trust Co. Bank v. U.S. Gypsum Co.*, 950 F.2d 1144, 1149 n. 7 (5th Cir. 1992). The Court need not resolve these questions for purposes of this appeal.

within the territorial boundaries of the state where the land is located." *Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 287 (5th Cir. 1987) (citing *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 (1895)). The question of whether an action is local or transitory depends on the law of the forum state. *Id.* at 287-88.

Under Texas law, actions that seek adjudication of title to real property are local in nature and must be brought where the land is situated. *Id.* at 287; *Miller v. Miller,* 715 S.W.2d 786, 788 (Tex. App. – Austin 1986, writ ref'd n.r.e.). "It is well-settled that a royalty interest in an oil and gas lease is an interest in real property, held to have the same attributes as real property." *Kelly Oil Co. Inc. v. Svetlik,* 975 S.W.2d 762, 764 (Tex. App. – Corpus Christi 1998, pet. denied); *see also Hayes,* 821 F.2d at 288 ("Under Texas law, it is clear that an interest in land under an oil and gas lease constitutes real estate, and that Hayes' action to terminate Gulf's interest [in a lease] is an action to try title to real property located in Colorado."). When applying the local action doctrine to disputes surrounding royalty interests in oil and gas leases, however, Texas courts distinguish actions that involve questions of title from those that lack "any legitimate dispute regarding the ownership of the interests held in the real property." *Kelly Oil Co. Inc.*, 975 S.W.2d at 764; *see, e.g., Hartman v. Sirgo Operating, Inc.*, 863 S.W.2d 764, 766-67 (Tex. App. – El Paso 1993, writ denied) ("The trial court was not required to determine ownership of land in New Mexico nor was any relief sought requiring the transfer of title to

land in New Mexico. The declaratory judgment suit was only seeking to determine obligations under a contract . . . ").

Bailey and Ptasynski's claims do not require any adjudication of title to real property and therefore do not fall within the scope of the local action doctrine. The claims alleged in Ptasynski's Complaint and Bailey's Amended Complaint reveal that ownership of the royalty interests was never at issue. Both Ptasynski and Bailey principally claimed that Shell violated its obligations under the Unit Agreement by improperly deducting transportation charges from royalty payments. Nor does either appellant seek any relief that would require transfer of title to royalty interests. Additionally, Shell never claims that Bailey or Ptasynski do not own the overriding royalty interests in the McElmo Dome Unit that form the basis for this litigation. Thus, the parties do not contest title or ownership of interest in mineral rights; the suit "was only seeking to determine obligations under a contract." *Hartman,* 863 S.W.2d at 767. Because parties only dispute Shell's obligations under a contract related to real property, the local action rule does not control.

Bailey also claims that 28 U.S.C. § 1392 required transfer of the case to Colorado. Section 1392 provides that "any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts." 28 U.S.C. § 1392. As we have just determined, this action is not "of a local nature," therefore § 1392 does

not apply. Regardless, § 1392 governs intrastate transfers of venue rather than interstate transfers.

C. *Res Judicata*

The district court determined that Ptasynski's claims were barred by *res judicata* and Ptasynski has not appealed that determination. Issues not briefed on appeal are waived. *Askanase v. Fatjo*, 130 F.3d 657, 668 (5th Cir. 1997). Because *res judicata* "constituted an independent ground for dismissal below, appellant [was] required to raise it to have any chance of prevailing in this appeal." *Atwood v. Union Carbide Corp.*, 847 F.2d 278, 280 (5th Cir. 1988). The dismissal of all of Ptasynski's claims is therefore affirmed on the basis that he waived appeal of the *res judicata* determination.

D. Application of Texas Law[5]

Bailey argues that the district court committed reversible error by applying Texas law rather than Colorado law. This Court reviews conflicts of law questions *de novo*, but the district court's factual determinations are reviewed for clear error. *Abraham*, 465 F.3d at 611.

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[5] Ptasynski's appeal raises the same choice of law arguments propounded by Bailey. However, because Ptasynski's dismissal is affirmed on *res judicata* grounds, the Court addresses choice of law issues only with respect to Bailey.

Federal courts apply the forum state's conflicts-of-law rules to determine what law governs state-law claims. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Texas courts initially determine whether there is a conflict between Texas law and the other potentially applicable law. *See SAVA gumarska in kemijska industria d.d. v. Advanced Polymer Sciences, Inc.*, 128 S.W.3d 304, 314 (Tex. App. – Dallas 2004, no pet.) ("[W]e should first determine if the laws are in conflict. If the result would be the same under the laws of either jurisdiction, there is no need to resolve the choice of law question."); *Vandeventer v. All Am. Life & Cas. Co.*, 101 S.W.3d 703, 711-12 (Tex. App. – Fort Worth 2003, no pet.) ("In the absence of a true conflict, we need not undertake a choice-of-law analysis."). Where there is a conflict of laws, Texas follows the "most significant relationship" test of the Restatement (Second) of Conflict of Laws § 188 to determine the law applicable to a contract dispute. *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 735 (Tex. 1997). Section 188(2) states the following:

> In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,

> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). Application of the most significant relationship analysis turns on the qualitative nature of the particular contacts with a state rather than the mere number of those contacts. *Gutierrez v. Collins,* 583 S.W.2d 312, 319 (Tex. 1979).

1. *Fiduciary Duties of Operators*

Bailey points to only two areas in which, he argues, Texas and Colorado law would arrive at different outcomes on his claims: fiduciary duty and post-production costs.

Bailey first asserts that Colorado and Texas law conflicts regarding the imposition of fiduciary duties on operators of oil, gas, and CO_2 units. "Texas law has never recognized a fiduciary relationship between a lessee and royalty owners." *HECI Exploration Co. v. Neel,* 982 S.W.2d 881, 888 (Tex. 1998). Nor have Texas courts ever stated that such a fiduciary relationship would never be recognized. *See In re Bass,* 113 S.W.3d 735, 744 (Tex. 2003) ("[A] grantee, after executing a mineral lease, owes a duty of the utmost fair dealing

to protect the amount of the grantor's royalty."); *Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 177 (Tex. 1997) ("[W]hile a fiduciary or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit.").

Colorado's law is similar and does not conflict with that of Texas. As the Tenth Circuit has interpreted Colorado law, "a lessee-lessor relationship, even if it encompasses the operation of an oil and gas unit, does not automatically create fiduciary responsibilities," but "that a fiduciary duty does not *necessarily* arise from a lessee-lessor relationship does not mean a fiduciary duty *never* arises from such a relationship." *Atl. Richfield Co. v. Farm Credit Bank of Wichita,* 226 F.3d 1138, 1162 (10th Cir. 2000).

2. *Contractual Allocation of Post-Production Costs*

In his second conflict of laws argument, Bailey argues that, unlike Texas law, Colorado law requires that post-production costs incurred to make the gas marketable are to be borne solely by the lessees.

Where leases are silent with respect to the allocation of costs, "the implied covenant to market obligates the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market. Overriding royalty interest owners are

not obligated to share in these costs." *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 902 (Colo. 2001) (quoting *Garman v. Conoco*, 886 P.2d 652, 659 (Colo. 1994)). After concluding that the "deductability of costs is determined by whether gas is marketable, not by the physical location or condition of the gas," the Colorado Supreme Court then defined marketability. *Id.* at 900-01. The court adopted the following definition:

> Gas is marketable when it is in the physical condition such that it is acceptable to be bought and sold in a commercial marketplace, and in the location of a commercial marketplace, such that it is commercially saleable in the oil and gas marketplace. The determination of whether gas is marketable is a question of fact, to be resolved by a fact finder.

Id. at 906. Thus, the working interest owner must bear the costs of getting the gas to a marketable condition and marketable location, but once the gas is marketable, additional costs to improve or transport the gas must be shared proportionately between the working interest owner and the royalty interest owner.

By contrast, in Texas "[a]lthough it is not subject to the costs of production, royalty is usually subject to post-production costs, including taxes, treatment costs to render it marketable, and transportation costs." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 122 (Tex. 1996). Therefore, Colorado and Texas

law conflict with respect to the default rule for allocation of post-production costs incurred *before* gas is marketable.

3. *Most Significant Relationship Factors*

Because Texas and Colorado law conflict in areas relevant to Bailey's claims, we proceed to analyze the most significant relationship factors. On balance, we conclude that the most significant relationship factors weigh in favor of applying Colorado law.[6]

Bailey acquired the leases in the McElmo Dome via instruments executed in various states, including Arizona, Georgia, Colorado, Ohio, and Illinois. The assignments from Bailey to Bridwell Oil were executed in Colorado. The assignments from Bridwell Oil to Shell, that created Bailey's overriding royalty interests, were executed in Texas. The contract most pertinent to this dispute, the Unit Agreement, was sent by Shell from Texas to New Mexico, where it was ratified by Bailey in 1983. However, "[s]tanding alone, the place of contracting is a relatively insignificant contact." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e.

To the extent that negotiations occurred, they took place in the states where the parties signed the agreements – Shell negotiated from Texas, and Bailey

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[6] Neither the Unit Agreement nor the leases incorporated choice of law provisions applicable to Bailey.

from Colorado, Texas, and New Mexico. The place of negotiation, however, "is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail. . . ." *Id.*

The place where the contract was to be performed is the most important factor under the most significant relationship test, and may be "conclusive in determining what state's law is to apply." *Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 54 (Tex. 1991) (quoting *DeSantis v. Wackenhut,* 793 S.W.2d 670, 679 (Tex. 1990)). Shell argues that the performance at issue is payment by Shell: Shell calculates value and makes payments from Texas; Bailey has received payments in Texas, Colorado, and New Mexico. But the gas interests governed by the assignments, leases, and Unit Agreement are located in Colorado and production necessarily takes place in Colorado. More specifically, the disputed transportation costs are incurred in moving the gas from Colorado to Texas.

With respect to the location of the subject matter of the contract, the place of production is undisputedly the McElmo Dome in Colorado. Bailey argues that this factor weighs so heavily in his favor as to be dispositive of the choice of law analysis. Shell claims that the actual dispute is money, not real property, and the valuation of royalties takes place in Texas. The Restatement (Second) of Conflicts of Laws § 188 comment (e) notes that:

> When the contract deals with a specific physical thing, such as land . . . the state where the thing or the risk is located will have a natural interest in transactions affecting it. Also the parties will regard the location of the thing . . . as important. Indeed, when the thing . . . is the principal subject of the contract, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the thing . . . was located would be applied to determine many of the issues arising under the contract.

Moreover, in the 1998 declaratory judgment action filed by Shell in state court, which ultimately resulted in this appeal, Shell alleged that "the determination of the proper method of royalty calculation in this case is a question of Colorado law" because "[t]he lands covered by Defendants' overriding royalty interests are located in Colorado" and "[t]he CO_2 on which royalty is paid is produced in Colorado." We therefore conclude that this factor weighs in favor of applying Colorado law.

At the time that he signed the Unit Agreement, Bailey resided in New Mexico; at the time this lawsuit was initially filed by Shell, Bailey resided in Texas; Bailey currently resides in Colorado. Shell's principal office is in Texas.

"Although the parties did not express a choice of what state's law would govern their agreement, they should have expected that [Colorado] law would at

least be invoked." *Maxus Exploration Co.*, 817 S.W.2d at 57. Here, the third and fourth factors are ultimately determinative of the choice of law issue. Under the most significant relationship test, Colorado law governs Bailey's state law claims. The district court erred by summarily concluding – without applying the Texas choice of law analysis – that "[t]his case will be decided under Texas law."

E. State Law Claims

Bailey further claims that the district court improperly granted summary judgment on his claims of breach of contract, fraud, breach of fiduciary duty, civil theft, unfair practices, civil conspiracy, and antitrust. Having concluded that Colorado, rather than Texas law applies, we evaluate Bailey's state law claims *de novo* under Colorado law, and conclude that the choice of law error was harmless because under Colorado law the outcome would be no different.[7]

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[7] All of Bailey's claims essentially boil down to a claim for breach of contract based on an alleged miscalculation of royalties owed on the gas produced from the McElmo Dome. Three courts, including this one, have reached basically the same conclusions. *See Ptasynski I*, No. 99-11049, 2002 WL 32881277, at *14 (5th Cir. Feb. 13, 2002); *Ptasynski v. Shell Western E&P, Inc.*, No. CA 3:97-CV-1208-R, 1999 WL 423022, at *8 (N.D. Tex. June 16, 1999); *Shell Western E&P, Inc. v. Bailey*, No. 98-28630 (215th Dist. Ct., Harris County, Tex. July 7, 2000).

1. *Breach of Contract*

As discussed above, Colorado law and Texas law differ in their default rules for allocation of post-production costs incurred before gas is marketable where a lease is silent with respect to the allocation of such costs. Thus, the difference in Texas and Colorado law is determinative only if the leases at issue here are silent.

Applying Texas law,[8] the district court concluded that "[t]he leases in this case are not silent. They were incorporated into the unit agreement and say that transportation costs may be deducted." Bailey does not assert that the leases at issue here are silent under Colorado or Texas law, nor does he advance alternate interpretations of the language contained in the leases; he in fact offers no discussion whatsoever of the language of the leases. Here there are 62 lengthy and detailed leases at issue, and "it is not the function of the Court of Appeals to comb the record

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[8] In *Rogers v. Westerman Farm Co.*, the Colorado Supreme Court decided whether certain leases were silent, or provided for the allocation of post-production costs between the working interest owner and the royalty interest owner. 29 P.3d at 887. The leases contemplated that royalties were to be computed "at the well." *Id.* at 891. The court concluded that the leases were "silent as to the allocation of all costs, including transportation costs." *Id.* at 906. The court determined that the leases were silent because they failed to "describe either the costs or the allowable deductions," did not "[contemplate] the sale of gas anywhere other than at the wellhead," and because "the intended meaning of the clause is unclear." *Id.* at 897-98.

for possible error, but rather it is counsel's responsibility to point out distinctly and specifically the precise matters complained of, with appropriate citations to the page or pages in the record where the matters appear." *United States v. Martinez-Mercado,* 888 F.2d 1484, 1492 (5th Cir. 1989); *see also* FED. R. APP. P. 28(a)(9)(A).

Further, neither the Unit Agreement nor the brochure sent by Shell changed the terms of the royalty valuation. As *Ptasynski I* concluded,

> "the Unit Agreement expressly and unambiguously provided that it did not change how working interest owners settle for royalty interests and such settlements would be governed by and in accordance with existing contracts, laws and regulations . . . The brochure does not purport to either be contractual or to alter the Unit Agreement or the existing contracts which governed royalty settlement, and it is at most representational . . . "

Ptasynski I, 2002 WL 32881277, at *11. Therefore the district court did not err by granting summary judgment on the breach of contract issue.

2. *Fraud*

Bailey's fraud-based claims are grounded in representations made by Shell in the brochure that it sent to royalty owners regarding the Unit Agreement. Bailey asserts that the brochure that Shell sent to

him along with the documents for approval of the Unit Agreement contained a statement that Shell know to be false, and that Shell intended for him to rely on.[9]

These claims lack merit because, as discussed above, the Unit Agreement provided that it did not alter existing leases that governed royalty settlement. As the district court stated, the brochure was superceded the Unit Agreement that was signed by Bailey. Thus Shell did not – through its brochure or any other manner – make false representations[10] to Bailey.

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[9] The brochure contained the following statements:

- Who will pay for installing and operating this program? All installation and operating costs will be paid by the working interest owners. There will be no charges to the royalty owners.
- What is the price for the CO2? The sales price provided in the contract with the Denver Unit is 90¢ per thousand cubic feet as of December 1, 1981. This price will fluctuate up or down based on the price of west Texas crude. Based on December, 1982 oil prices, the sales price is about 85¢ per thousand cubic feet.
- Will the royalty owners of interest in this Unit have to pay for the pipeline, transportation or injection of CO2 in west Texas? No.

[10] Under Colorado law, to establish fraud a plaintiff must prove that: (1) a fraudulent misrepresentation of material fact was made; (2) the plaintiff relied on the misrepresentation; (3) the plaintiff had the right to rely on, or was justified in relying on, the misrepresentation; and (4) the reliance resulted in damages. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382

(Continued on following page)

3. *Breach of Fiduciary Duty*

Under Colorado law "[o]rdinarily, the mere reserving of an overriding royalty in the assignment of an oil and gas lease does not create a confidential or fiduciary relationship." *Atl. Richfield Co.*, 226 F.3d at 1162 (quoting *Degenhart v. Gold King Petroleum Corp.*, 851 P.2d 304, 306 (Colo. Ct. App. 1993)). A fiduciary duty flowing from an overriding royalty interest might result from "a close relationship between the parties, bad faith on the part of the lessee, or specific language of the assignment protecting the overriding royalty interest." *Degenhart*, 851 P.2d at 306 (cited with approval by *Garman v. Conoco, Inc.*, 886 P.2d 652, 659 n.23 (Colo. 1994)). Shell owes no fiduciary duty to Bailey – they are actors in an arm's length transaction – so his claim for breach of fiduciary duty cannot survive.

4. *Antitrust*

Next, Bailey fails to meet even the most basic of antitrust requirements – he has suffered no antitrust injury and, accordingly, lacks antitrust standing. *Norris v. Hearst Trust*, 500 F.3d 454, 465 (5th Cir. 2007). If Shell were to raise the price of gas, Bailey would benefit because his royalty payment would increase. As the district court noted, Shell's charging in parallel with other unit operators is a "conspiracy,"

(Colo. 1994) (citing *Zimmerman v. Loose*, 425 P.2d 803, 807 (1967)).

but it is a legitimate one approved by the State of Colorado. *Bailey v. Shell Western E&P, Inc.*, 555 F. Supp. 2d 767, 776 (S.D. Tex. 2008).

5. *Civil Theft*

Bailey alleges that Shell committed civil theft under § 18-4-401 of the Colorado Revised Statutes.[11] To maintain an action for civil theft, the owner of property must prove all of the statutory elements of theft, defined as "knowingly obtain[ing] or exercis[ing] control over anything of value of another without

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[11] The relevant portion of COLO. REV. STAT. § 18-4-401 states:

> (1) A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, and:
>
> (a) Intends to deprive the other person permanently of the use or benefit of the thing of value; or
>
> (b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit; or
>
> (c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use and benefit; or
>
> (d) Demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person.

The Rights in Stolen Property Statute, § 18-4-405 of the Colorado Revised Statutes, states that "[a]ll property obtained by theft, robbery, or burglary shall be restored to the owner."

authorization, or by *threat or deception*, and . . . [i]ntend[ing] to deprive the other person permanently of the use or benefit of the thing of value." COLO. REV. STAT. § 18-4-401(1)(a); *West v. Roberts*, 143 P.3d 1037, 1040 (Colo. 2006) (emphasis added). "Theft by deception as set forth in subsection 18-4-401(1)(a) requires proof that the victim relied on a swindler's misrepresentations, which caused the victim to part with something of value." *Id.* (citing *People v. Warner*, 801 P.2d 1187, 1189-90 (Colo. 1990)).

Bailey does not assert theft by threat, and a claim of theft by deception fails as a matter of law because it hinges on the alleged misrepresentations made by Shell. For the reasons discussed above, the statements in the brochure were not misrepresentations. Therefore, the district court correctly held that here the alleged underpayment of an amount due does not result in a theft.

6. *Conspiracy*

To the extent Bailey alleges that Shell engaged in a conspiracy to commit fraud, breach of fiduciary duty, or anything else, his claim fails because it is not supported by an independent unlawful act. Bailey failed to demonstrate a fact issue as to whether Shell

committed "an unlawful overt act,"[12] therefore the civil conspiracy claim also fails as a matter of law.

F. Original Source under the FCA

The district court granted summary judgment on Bailey's FCA claims on the basis that Bailey did not carry his burden to prove that the allegations in his FCA claims were not based upon prior, public disclosures – or, if they were, that he was an original source of the information. This court reviews a district court's grant of summary judgment *de novo*. *Kimberly-Clark Corp. v. Factory Mut. Ins. Co.*, 566 F.3d 541, 545 (5th Cir. 2009).

The FCA provides that:

> No court shall have jurisdiction over an action under this section . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information . . . 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the

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[12] The elements for a civil conspiracy claim were set forth by the Colorado Supreme Court in *Nelson v. Elway*: "To establish a civil conspiracy in Colorado, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result." 908 P.2d 102, 106 (Colo. 1995).

> Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). Here, the claim is based primarily on public information and Bailey is unable to offer evidence that he was an original source. Therefore the district court appropriately granted summary judgment on the FCA claims.

G. Disclosures Under Rule 26

Bailey finally argues that the district court's grant of summary judgment improperly considered evidence that should have been excluded under Federal Rules of Civil Procedure 26 and 37. Rule 37 provides in relevant part that a party who fails to disclose information under Rule 26 "shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion, any witness or information not so disclosed." FED. R. CIV. P. 37(c)(1). In evaluating whether a violation of Rule 26 is harmless, and thus whether the district court was within its discretion in considering the evidence, this Circuit considers four factors: "(1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose." *Texas A&M Research Found. v. Magna Transp.*, 338 F.3d 394, 402 (5th Cir. 2003). Bailey identifies no evidence that Shell failed to disclose and then offered in support of its motion for summary judgment, or

that the district court considered in its decision to grant summary judgment. Accordingly, Bailey's argument fails.

IV. CONCLUSION

For the foregoing reasons, the district court's grant of Shell's motion for summary judgment is AFFIRMED.

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

Gerald O. Bailey, *et al.*,	§	
Plaintiffs,	§	
	§	
versus	§	Civil Action H-05-1029
Shell Western E&P, Inc.,	§	
et al.,	§	
Defendants.	§	

Opinion on Summary Judgment

I. *Introduction.*

Three plaintiffs accuse oil companies of purposefully miscalculating royalty payments to their detriment. Though they sue under a wide variety of poorly defined legal theories, the case is essentially a contract dispute. The plaintiffs signed the contract, and it is clear about the parties' rights and duties. The method used by the oil companies to calculate royalty payments is proper. After some twenty years of baseless complaints and fifteen years of expensive, unnecessary litigation, this is the end.

2. *McElmo Dome.*

The McElmo Dome is a carbon-dioxide reservoir covering 203,000 acres of Montezuma County, in southwestern Colorado. The gas is used in oil fields – it is injected into them to help drive the oil toward

producing wells. Until the early 1980s, the gas was produced from seven tracts.

In 1982, Shell Western E & P and Mobil Producing Texas & New Mexico, Inc., decided to combine the tracts for increased efficiency. When they applied to form a unit, the Colorado Oil and Gas Commission required the producers – Shell for convenience – to get consent from 80% of both working and royalty interests. Shell owned 87% of the working interest, satisfying that requirement. The United States Minerals Management Service consented for its 76% of the royalty interest. Shell needed the approval of only 4% more of royalty interest.

Shell sent the owners of the royalty interests: (a) a brochure about the project; (b) the unit agreement; and (c) a consent form. The owners of an additional 16.5% of royalty interests consented, giving Shell a total of 92.5%. The commission approved the unit.

Also in 1982, Cortez Corporation, Mobil Cortez Pipeline, Inc., and Continental Cortez Pipeline Company created Cortez Pipeline Company. They formed it to finance, construct, and operate a pipeline to transport the gas from southwestern Colorado through New Mexico into West Texas – approximately 500 miles.

3. *The Conflict.*

Shell began paying royalties in 1984. Twelve years later, some royalty owners sued Shell in Texas

and Colorado, disputing its calculations for the first time. They primarily argued that Shell was not allowed under the leases, assignments, and unit agreement to charge them for the cost of moving the gas to Texas.

The royalty owners say that they are entitled to royalties based on the price of the gas delivered in Texas. They say that somehow Shell promised that they would not pay transportation costs, so it may not charge them. They have two theories: First, Shell breached its contractual obligations. Second, if the contracts allow the "deductions," then it tricked them into signing the contracts.

4. *The Calculation.*

Although they can pick any method the parties prefer, leases ordinarily specify one of these methods to calculate royalties:

- The value – price – of gas at the well-head;
- The value of gas after gathering, dehydration, compression or other process to standardize it; or
- The value of gas at a point downstream, usually a sale.

The value of a commodity varies depending how much work it takes to get it ready for sale and transported to a market. Iron ore's value at the portal of a mine in the Mesabi Range in Minnesota is lower than

its value delivered at a steel mill in Gary, Indiana. The difference represents the cost of the intermediate steps to get it to the mill-like freight, credit risks on the downstream sales, and compensation for the entrepreneurial effort. The only use for the ore at the mine is selling it to someone who will process and transport it to market. The problem of intermediate steps applies to all commodities, from Toyotas in Japan through wheat in Kansas to carbon dioxide in Colorado.

Carbon dioxide's principal use in large volumes is injection into secondary-recovery wells in aging or otherwise low-pressure oil fields. West Texas needs a lot of the gas, while Colorado needs little. That makes Texas a market. The value of the gas at the wellhead needs to be calculated.

The value of a commodity at a source may be indeterminate unless (a) it has alternative potential buyers at the source, (b) its site and condition are sufficiently parallel to the commodity elsewhere to compel a close analogy, or (c) its value at the source can be reasonably estimated by working from the remote sales price back to the source.

This Colorado gas is in the last class. Shell calculated the value of the gas at the wellhead in Colorado by subtracting the cost of standardization and transportation from the price it received from the injecting oil operators in West Texas.

5. *The Lawsuits.*

In 1996, the CO_2 Coalition – seventy owners of varying interests in McElmo Dome – brought a putative class action against Shell, Kinder Morgan, Mobil, and Cortez Pipeline in Colorado federal district court. In 2000, three other class actions were filed in that court by classes of (a) land owners, (b) royalty owners, and (c) non-operating working interest owners. In September 2001, the four cases were settled. Ninety-six percent of the royalty-interest owners joined in the settlement.

In January 2002, Harry Ptasynski, Bridwell Oil, Gerald Bailey, and W.L. Gray & Company chose not to join the settlement. The parties were further narrowed by Bridwell Oil's settlement in June 2006. The remaining plaintiffs are (a) Gerald Bailey, (b) Harry Ptasynski, and (c) W.L. Gray & Co.

In 1997, Bailey sued Shell in the Northern District of Texas. He made several claims under state law and one under federal law. He lost on every claim.

In 1997, Ptasynski and Gray sued Shell, Mobil, and Cortez Pipeline in the Northern District of Texas. They made several claims under state law and one under federal law. They lost on every claim.

In 1998, Shell sued in state court in Houston, Harris County, Texas, asking the court to declare its royalty obligations. Bailey counterclaimed. By March 2001, all but Bailey's fraud-based counterclaims were

resolved in favor of Shell. At that time, the probate court for Denton County, Texas, took the case from the Harris County district court at the request of the plaintiffs in another case. In late 2002, the Texas Supreme Court vacated the transfer, and it returned the case to Harris County. It was then abated until March 2004. In March 2005, Bailey removed it.

In 2004, Ptasynski & Gray – for themselves, the United States, Colorado, and Montezuma County – sued Kinder Morgan G.P., Inc., in Colorado federal court. The government declined to participate directly. Because the plaintiffs asserted claims identical to those Bailey made in his counter-claim, the Colorado suit was transferred here.

6. *This Case.*

Gerald O. Bailey is a geologist. From 1973 to 1976, Bailey acquired interests in Dolores and Montezuma counties by leasing minerals and buying working interests. In 1982, Bailey held interests under sixty-two leases on acreage that became part of the McElmo Dome Unit. Since 1997, he has been pursuing unfounded litigation against Shell with the help of his attorney, Robert Perry.

Bailey's complaint does not specify his claims. Rather, a rambling seven pages titled "claims for relief" appears to include (a) breach of contract, (b) breach of fiduciary duty, (c) violation of anti-trust laws, (d) fraud, (e) civil theft, and (f) conspiracy.

Harry Ptasynski is a citizen of Casper, Wyoming. He has owned overriding royalty interests in the McElmo Dome since it was formed. W.L. Gray & Co. is a Colorado partnership that succeeded to the overriding royalty interests of W.L. Gray in the unit.

Ptasynski and Gray sue for (a) damages under the False Claims Act, (b) breach of contract, (c) breach of fiduciary duty and confidential relationship, (d) breach of implied duties to market and good faith and fair dealing, (e) violation of federal and Colorado anti-trust laws, (f) violation of the Colorado Unfair Practices Act, (g) civil theft, and (h) a declaratory judgment.

7. *Already Done.*

A claim is barred when (a) the same parties are in both actions, (b) the court had jurisdiction of the first action, (c) the court decided the merits, and (d) the same transaction is involved in both suits. If these conditions are satisfied, the claims or defenses arising from a common nucleus of facts are extinguished.[1] A party with more than one remedy for a wrong must assert them all in its first action.[2]

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[1] *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 (5th Cir. 2004).

[2] *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319 (1927).

In 1998, Ptasynski and Gray sued Shell in Dallas on underpayment of royalties. The parties and transaction are identical to those here. The court had jurisdiction. The action concluded with a final judgment on the merits – Ptasynski and Gray lost. While Ptasynski and Gray have included different legal theories in this case, the cause of action – the facts giving rise to the claim – is the same. They are claiming Shell underpaid their royalties under the instruments of their interests including those of the unit. For these reasons, Ptasynski's and Gray's claims are exhausted.

Even if they had not been litigated earlier, they would take nothing on their claims for the same reasons Bailey will not.

8. *Repeat Offenders.*

Bailey argues that each time he receives a payment less than what he says he deserves, Shell has injured him anew. Bailey uses this logic to sue – over and over again. There is one set of facts that creates a basis for the suit – Shell's calculation of royalties in the McElmo Dome. Shell has calculated them correctly. Bailey has never been injured – much less repeatedly. This is the last time Bailey can sue on these facts.

9. *Breach of Contract.*

In 1973 and 1974, Bailey acquired several mineral leases in Montezuma County, Colorado. Bailey assigned the leases to a third party, retaining an overriding-royalty interest. That party assigned the leases to Shell. In 1983, Shell sent Bailey and other royalty owners a unit agreement. It said that the royalties were to be paid in conformity with the contracts, laws, and regulations. Bailey signed the unit agreement. In 1984, Bailey agreed to a series of division orders.

Bailey says that Shell breached the unit agreement by "wrongfully and illegally deducting transportation charges and expenses from the royalty payments."[3] He says that the others and he were promised the downstream value.

Bailey's overriding royalty was created by assignment. It says that he gets a percentage of the value at the wellhead – not of the downstream value. This value is determined by subtracting the post-production costs – including transportation – from the value realized beyond the wellhead. Further, the assignment incorporates the underlying leases. Shell paid Bailey exactly what he contracted for – the downstream value less the cost of getting it there.

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[3] (Bailey Am. Complaint at 105).

The unit agreement does not change this; it says that royalty obligations are determined under the assignments and leases.

Because of the complexity of mineral titles and because both sides need to tend to their own business, producers do not disburse royalties until the potential recipients agree in writing what share they are going to be paid. These are called division orders. Bailey signed 32 of them.[4] They describe the royalty formula and say:

> Settlement for each interest shall be made on the volume of total unit production sold or delivered, and allocated to [your] Tract, and on the price received by the lessee, less applicable charges including transportation.[5]

This is the wellhead value of a commodity without a broad market. The Shell contract specified the value at the wellhead, and the division orders disclosed how Shell derived it.

Bailey signed these orders and accepted payments under them beginning in 1984. Bailey first expressed discontent six years later, in a letter in 1990. He said nothing more for seven years – until

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[4] (Shell's Motion for Summary Judgment, Ex. 6 j-k).

[5] *Id.*

after the 1997 suit. Bailey has waived his claim to larger payments.[6]

The plaintiffs insists [sic] that Colorado law prohibits charges from the value of the royalty-interest oil before its being in a commercial marketplace and in marketable condition.[7] In one confusing and probably wrong case, the court determined that the leases before it required that the operator not deduct the costs of post-production treatment – because the leases did not expressly allocate them. The case also addressed the reasonableness of the producer's effort to market the gas; transportation to a market was discussed but not decided.

Bailey has a right to a percentage of the value of the production – cost free – at the wellhead. He says that Shell is deducting freight from his share before paying him. This case will be decided under Texas law;[8] Colorado law is probably the same.[9] The

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[6] *Mattalino v. Trinity Petroleum Exploration*, 927 F.Supp. 986, 989 (S.D.Tex. 1996) (Geologist waived larger overriding royalty interest payments because he signed a division order, accepted payments, and knew the oil business).

[7] *See Rogers v. Westerman Farm Company* 29 P.3d 887 (Colo. 2001); *But see* Scott Lansdown, *The Marketable Condition Rule*, 44 S. Tex. L. Rev. 667 (Summer 2003).

[8] *Heritage Res. v. NationsBank*, 939 S.W.2d 118, 122 (Tex. 1996); *Judice v. Mewbourne Oil Co.*, 939 S.W.2d 133, 135 (Tex. 1996).

[9] *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138 (10th Cir. 2000) (Colorado law).

controversy here is over transportation costs, not production costs or marketable condition.

The leases in this case are not silent. They were incorporated into the unit agreement and say that transportation costs may be deducted. The division orders, the last documents signed by the plaintiffs, also say that transportation costs may be deducted. Finally, the plaintiffs in the Colorado case did not continue to accept royalty payments for six years without complaint, waiving their claim to higher payments.

At least some of the leases that can be read also say that the royalty is payable from the price at the well. "At the well" is a pricing term – an unambiguous one. If a lease says that the royalty is one-eighth of the market price of the gas at the wellhead of a particular well in Montezuma county, Colorado, it is exactly as commercially precise and reliable as the sales contract for 1,000 head of cattle that says it is at the market price free on board – F.O.B. – truck Moffat County, Colorado. Neither of those agreements would contemplate that the price will be determined by the goods in a different condition after some treatment or another location after transportation. *See Harsh v. Cure Feeders*, 116 P.3d 1286, 1289 (Colo. App. 2005); *see Transamerica Corp. v. Merrion*, 255 P.2d 391, 398 (Colo. 1953). "At the well" is directly parallel to "free along side" the wellhead.

The claimants have consented to the treatment of which they complain. The producers have adhered to

the instruments between themselves and the claimants. The producers have not breached a contract.

10. *An Action in the Public Interest.*

Bailey sues under the False Claims Act on behalf of the United States of America, the state of Colorado, and Montezuma County.[10] The purpose of the False Claims Act is to recover losses to the United States government through fraud.[11] A plaintiff may not sue based on publicly disclosed information about fraud unless he was the original source of those facts.[12] Bailey has pleaded and argued no fact that would convince a rational jury that (a) his facts and theories were not public or (b) he was the original source.[13]

Bailey does not contest that his claim is primarily based on public information; this is likely because he had already sued on this same claim. Indeed, many other royalty owners have sued Shell for this

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[10] 31 U.S.C. § 3730.

[11] Charles Alan Wright, et al., Federal Practice and Procedure § 3653 (3rd ed. 1998).

[12] 31 U.S.C. § 3730(e)(4).

[13] *United States v. Alcan Elec. & Engineering, Inc.*, 197 F.3d 1014, 1018 (9th Cir. 1999); *United States ex rel. Stone v. Rockwell Int'l. Corp.*, 282 F.3d 787, 800 (10th Cir. 2002).

reason.[14] The information became a public record when the complaints were filed.[15]

Bailey insists that because his suit contains some non-public information, Shell's position that all material claims are public is "destroyed." Secret trivia does not change the elemental nature of Bailey's suit: Shell underpaid royalties.[16]

Because the allegation had been made public, Bailey must show that he is its original source.[17] He can not. Bailey says that he had "direct and independent knowledge" of the fraud because of (a) his investigation beginning in 1990 and (b) his 1997 suit against Shell.

Bailey's 1990 "investigation" is a letter he wrote Shell about gas pricing.[18] Bailey also says that his investigation continued from 1994 to 1996. To support this claim, he offers two 1996 e-mails between Shell employees. He claims that the Shell employees are discussing "a letter from Mr. Bailey asking for

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[14] (Bailey Am. Complaint at 12-15)

[15] *See Kennard v. Comstock,* 363 F.3d 1039, 1042-1044 (10th Cir. 2004); *United States ex rel Reagan v. East Texas Medical Center Regional Healthcare System,* 384 F.3d 168, 174 (5th Cir. 2004).

[16] *See United States ex rel. Grynberg v. Praxair, Inc.,* 389 F.3d 1038, 1051 (10th Cir. 2004) (Relator's additional nonpublic information fails the jurisdictional requirements because material elements of the transaction were already public).

[17] 31 U.S.C. § 3730(e)(4)(B).

[18] (Bailey Am. Complaint, Ex. 17).

information."[19] First, the e-mails actually respond to the inquiries of another royalty owner, Bob Pelo.[20] They describe the general "sensitive" relations with royalty owners over this issue. These e-mails contradict Bailey's being the origin by indicating that others are – at the least – contemporary, parallel sources. Bailey also refers to letters written to him from Shell responding to a pricing question.[21] These letters do not show that Bailey discovered fraud.

The record lacks other documents that suggest an investigation. The single letter is not an investigation, and it does not suggest that Bailey uncovered fraud.[22] Even if Bailey's letter evinced an investigation, Bailey must show that his investigation discovered something other than what the public already knew.[23] He can not, clearly, in light of the numerous other royalty payment cases about the McElmo Dome.

Bailey also offers his first suit against Shell in 1997 as evidence that he is the origin. In 1996, the year before Bailey's suit, seventy McElmo interest owners sued Shell.[24] Bailey cannot be the original

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[19] (Bailey Am. Complaint at 78).

[20] (Bailey Am. Complaint Ex. 31-32).

[21] (Bailey Am. Complaint Ex. 33-34, 37).

[22] *Grynberg*, 389 F.3d at 1054 (Plaintiff bringing suit on underpayment of royalties was not original source because he did not directly detect the fraud.)

[23] *See Reagan*, 384 F.3d at 179.

[24] (Bailey Am. Complaint at 1, 73-75)

source of information "acquired from the labors of others"[25] or from reading the papers. This suit exemplifies why these jurisdictional bars are necessary to prevent parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud.[26]

Even if Bailey could overcome these bars to his suit, he has revealed no fraud. Bailey's claim is that Shell owes the United States money for royalties. For his case, he relies on a brochure, despite his having signed a contract with Shell governing these payments. He knows nothing of what the government received, knew, asked, or relied on. Like Bailey's personal claims, the government might have a contract dispute on its hands – not a fraud.

Bailey's claims for the State of Colorado and Montezuma County fail. The False Claims Act does not allow for suits on behalf of a state or its county.[27] In 2000, a bill was introduced in the Colorado General Assembly called the "Colorado False Claims Act," but it was not passed.[28] Because no federal or Colorado law gives Bailey authority to sue for them, Bailey's claims on their behalf will be denied.

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[25] *See United States ex rel. Fine v. Advanced Sciences*, 99 F.3d 1000, 1006-1007 (10th Cir. 1996).

[26] *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs., Co.*, 336 F.3d 346, 351 (5th Cir. 2003).

[27] *See* 31 U.S.C. § 3730(b).

[28] H.B. 1094, 62nd Gen. Assem., 2nd Reg. Sess. (Colo. 2000).

Bailey says that this court cannot dismiss his claims for the government without approval from the United States. First, the United States has confided this dispute to Bailey; it did that when it declined to accept responsibility itself. Second, despite many unrepublican exceptions in favor of the government, the courts have decided cases affecting the executive since Jefferson's first term without the permission of that branch.[29]

11. *Fiduciary Duty.*

Texas law generally does not recognize a fiduciary duty in business transactions.[30] In an ordinary commercial, contractual relationship, no duty exists.[31] To establish a fiduciary duty in a business transaction, the relationship must have existed before the agreement forming the basis of the suit.[32]

Shell had no earlier relationship with Bailey, nor have they ever had a relationship of trust and confidence – formal or informal. Rather, Shell was an assignee and Bailey an owner of an intermediate

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[29] *Marbury v. Madison,* 1 Cranch* 137 (1803); *Searcy v. Philips Electronics North America Corp.,* 117 F.3d 154, 158 (5th Cir. 1997) (Whether *voluntary* dismissals needed the Attorney General's approval).

[30] *See English v. Fischer,* 660 S.W.2d 521, 522 (Tex. 1983).

[31] *Central Sa. & Loan Ass'n v. Stemmons Northwest Bank, NA,* 848 S.W.2d 232, 239 (Tex. App. – Dallas 1992, no writ).

[32] *See Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 176 (Tex. 1997).

non-working interest. Texas law has never recognized a fiduciary relationship between a royalty owner and an operator.[33]

An agency is a relationship that normally includes fiduciary duties. An agent owes a duty of fidelity to his principal. Shell was not Bailey's agent. The unit agreement describes Shell as an independent contractor – not an agent; it is accurate because Bailey had no authority to control Shell's operations. Bailey was simply entitled to royalty payments. Shell owes no obligation of care to serve Bailey faithfully.

12. *Antitrust.*

Antitrust laws are designed to increase competition – to stop companies from colluding to raise consumers' costs through set prices or allocated markets. Bailey's royalty payment – under any method of calculation – is a percentage of the price of gas. If Shell conspired to raise the price of McElmo gas, Bailey would benefit. Bailey has no antitrust injury. Shell's charging in parallel with other unit operators is a conspiracy, but it is a legitimate one, approved by the State of Colorado. Joint management of properties would have been legal without the government sanction. Bailey has identified no market in which Shell's cooperation would have been anti-competitive or potentially dominate. Also, with only one practical

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[33] *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1998).

market, the producers are not colluding as much as jointly accepting the state of their world.

Further, Bailey is not a competitor of Shell. Bailey does not buy gas, sell gas, or otherwise participate in the carbon-dioxide market in competition with Shell. He lacks standing to bring an antitrust claim.

13. *Fraud, Civil Theft, and Conspiracy.*

Bailey's fraud, civil theft and conspiracy claims are merely slices of his disagreement about his royalty calculation. His unhappiness about a deal he made in 1982 does not make cheaters of the other contracting parties.

This is the "fraud" that he identifies: In the negotiations leading to the unitization of the dome, Shell gave him a brochure with a knowingly false statement. Shell intended him to rely on it. He says he did reasonably rely on it to his detriment. A brochure – misleading or otherwise – is superceded by the operating unit agreement. Bailey is like someone who signs a 30-year office lease of a dozen pages and who, when he becomes unhappy, sues for fraud because a brochure he was given said it was a great location. The unit agreement explains the parties' relationship in detail, and it sets Shell's obligations.

Further, for fraud to exist, the representations Shell made to Bailey must have been clearly untrue, known to have been untrue at the time, and relied on

reasonably by Bailey to his detriment. Bailey cannot get past the first requirement because Shell's statements are true. The misrepresentations are that Bailey would be entitled to royalties on the downstream value. Nowhere in the representations – the unit agreement or the brochure – does it even mention downstream value.

Bailey's confusion – if he is confused, rather than obstinate – may stem from the statement that royalty owners will not have to pay transportation costs. This is true. Royalty owners were never asked to pay for pipeline construction, maintenance, or anything else. Their royalty payments were calculated as specified in the contract by a percentage of value at the wellhead. The value of gas at the wellhead is calculated – of necessity and economics – by deducting transportation costs. This is the distinction that continues to elude Bailey. His misunderstanding is not Shell's fraud.

The civil theft claim is that Shell paid Bailey less than what was owed. Bailey should have been told by his lawyer that an underpayment results in a debt not a theft.

The conspiracy is an expansion of an underlying wrong. Bailey simply claims that Shell was assisted by people who helped it receive "secret payments." A

claim for conspiracy fails because it is not supported by an independent tort.[34]

14. *Conclusion.*

America is blessed with a legal system that allows an aggrieved person to initiate a suit to petition for redress. This openness has its costs. Many people who are unlearned and without the assistance of counsel bring actions that consume scarce private and public resources. The waste can be tolerated – tolerated to a point. When Gerold [sic] O. Bailey, Ptasynski, and W.L. Gray & Co. decide with the connivance of their lawyer, Robert Perry, to repeat a lawsuit, to expand it, and to persevere when sane men would quit, their public and private victims are not obliged to supinely accept the waste imposed on them. These people of broad experience and sophisticated education are not wards of the court.

In what the court would consider an equitable cost-shifting sanction, it invites the defendants to request relief from some of the burden of this legally misguided, factually unfounded, repetitive litigation.

In every capacity, Bailey, Ptasynski, and Gray will take nothing on their claims against the defendants.

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[34] *See Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 955 (Tex. 1979).

Signed on April 22, 2008, at Houston, Texas.

/s/ Lynn N. Hughes USDJ

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

SHELL WESTERN E&P, INC., Plaintiff, *versus* GERALD O. BAILEY, *et al.*, Defendants.	§ § § § § § §	Civil Action H-05-1029

Order

All pending motions are denied without prejudice.

The parties must file a joint set of exhibits.

By February 3, 2006, the Perry and Hartnett must each file one amended complaint on behalf of all their clients.

By February 15, 2006, the defendants must respond and counterclaim.

By February 24, 2006, the defendants must move for summary judgment.

By March 28, 2006, the plaintiffs must respond.

Signed January 19, 2006, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

ARGUMENTS FOR CONSENT DECREE
VERSUS ICC TARIFF

7% Consent Decree (Calculated with 1 BCF Throughout)

Facts:

Initial Tariff – 57¢/MCF Initial Source Price – 80¢/MCF
Initial Del. Cost – $1.37/MCF

P/L E.P. – 16.8% Source E.P. – 33%

– At any point in time, given a delivered cost of CO_2, Shell benefits from the highest possible pipeline tariff, because this will reduce our royalty (0.1875) and severance tax payment (0.07) at the source. For example, on the D. U. sale (1.2 TCF), this savings in royalty and severance tax means about $8MM (PVPAT) to Shell if we sell the full 330M/D.

  This savings was calculated based on the fixing the present value delivered cost to the Denver Unit the same as our original offer. The appropriate source price was then determined for each tariff case, and the total combined PVPAT (source plus pipeline) was determined. The $8MM savings resulted from this calculation. This conclusion is also the same if the delivered cost is not determined by our contract but is allowed to vary based on other conditions (such as would occur if there are reopeners with a favored [n]ations clause). In this case, the higher tariff at any point favors Shell, due to reduced royalty and severance taxes at the source.

- This should permit early agreement with Mobil and Continental on tariff and allow us to proceed with CO_2 sales negotiations with Denver Unit, Willard Unit, and Seminole. In our judgement, this will save about three months' time, which is worth about $6MM to Shell in terms of reduced WPT payments (after tax) at the D.U.
- May have to change from ICC to Consent Decree after 10 years when ICC tariff exceeds consent decree. This would reduce PVPAT on pipeline for ICC Case by [illegible]
- If other shippers come into line, want higher tariff – first 10 years favors C.D.